ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable J. Derham Cole, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DINAL WAYNE KEITH,

APPELLANT

APPELLATE CASE NO 2017-001088

INITIAL BRIEF OF APPELLANT

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II.

Whether the trial court erred in admitting testimony from confidential informant Sullivan and former co-defendant, turned State's witness, Brandon regarding alleged other drug activity involving Appellant where such testimony such testimony constituted improper Lyle evidence?

STATEMENT OF THE CASE

On March 9, 2017, the York County Grand Jury returned indictments against Appellant Dinal Keith for possession with intent to distribute ("PWID") buprenorphine and trafficking hydrocodone. R. * (indictments).

On April 24-27, 2017, Keith appeared for trial before the Honorable J. Derham Cole and a jury. Keith was represented by Mindy Lipinski, and the State was represented by assistant solicitor Blaine Pleming. Tr. 1. The jury convicted Keith of both offenses. Tr. 471, ll. 12-25. Judge Cole imposed a sentence of twenty-five years imprisonment and a one-hundred thousand dollar fine for the trafficking offense and a concurrent sentence of twenty years for the PWID offense. Tr. 474, l. 20 - 475, l. 6.

This appeal follows.

ARGUMENT

I.

The trial court erred in admitting Appellant's statements where the advice of rights form he was provided included language "we have no way of appointing you a lawyer" and where Appellant was instructed that his signature on the form indicated only his understanding of his rights and did not specify that it constituted a waiver of rights.

Relevant Facts

Brian "Sully" Sullivan was arrested and facing the service of warrants for various drug distribution offenses. In exchange for law enforcement's agreement to refrain from serving his warrants, also known as "holding the warrants," Sullivan began working as a confidential informant. His first target was Appellant Dinal "Denny" Keith. Tr. 203, ll. 1-5; Tr. 232, l. 7 – 234, l. 23; Tr. 246, l. 12 – 249, l. 13; Tr. 311, l. 5- 312, l. 11; Tr. 330, l. 4 – 331, l. 8; Tr. 355, ll. 3-25; Tr. 356, l. 18 – 358, l. 15. Sullivan alleged that from April 8 to 28, 2016, he made four undercover drug purchases from Keith and Keith's live-in girlfriend, Sherry Brandon, only two of which resulted in audible videos. Tr. 203, l. 9 – 211, l. 13; Tr. 221, l. 10 – 225, l. 22; Tr. 235, l. 23 – 243, l. 6; see State's Ex. 2 (Home Depot parking lot video, on file with this Court); State's Ex. 5 (living room video, on file with this Court). It was the April 28, 2016 "buy" that resulted in the charges against Keith and Brandon. R. * (indictments). The same day, the two were arrested during the execution of a search warrant upon their home and taken to the police station for questioning. Tr. 164, l. 2 – 172, l. 24; Tr. 319, l. 9 – 327, l. 12. In an effort to reduce her own criminal exposure, Brandon testified against Keith. Tr. 291, l. 9 – 292, l. 10; Tr. 302, l. 2 – 303, l. 10.

Following a pre-trial Denno[1] hearing, the trial court ruled that the prosecution could admit testimony regarding incriminating statements Keith allegedly made to officers investigating the case. Tr. 26 – 68. The "acknowledgment of rights" form signed by Keith and Brandon was published to the trial judge during the pre-trial hearing and admitted into evidence at trial. Tr. 30, l. 15 – 31, l. 11; Tr. 168, ll. 20-25; R. * (State's Ex. 1, rights form). The "constitutional rights" section of the form included the following:

> You have the right to remain silent. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advice before answering any questions and to have your lawyer present during questioning. **You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of appointing you a lawyer*, but one will be appointed by the Court for you if you wish.** If you wish, you may answer questions without the presence of a lawyer and you may stop answering any time you desire.

R. * (State's Ex. 1, rights form) (emphasis added). Defense counsel argued that instructing an arrestee that you have the right to an attorney but that they have no way of appointing you one "eviscerates the defendant's . . . Sixth Amendment right to counsel." Tr. 67, ll. 5-24. The trial judge ruled, stating only: "All right. I find the statements to be freely and voluntarily made therefore the motion to exclude is denied." Tr. 68, ll. 2-4.

The prosecution's first witness, Lieutenant James Ligon, testified that Keith was seated on the couch in his living room when he was advised of his Miranda rights by investigator Gander. Tr. 166, ll. 3-19. Keith was not questioned until after he arrived at the police station, at which time he allegedly told the officers that "he was selling his scripts basically to live" and "to get by;" that "what he did was on him," and "was his fault, nobody else's;" and that the hydrocodone pills "were prescriptions that he had gotten from a doctor that had been prescribed." Tr. 173, l. 13 – 174, l. 13. On cross-examination, Ligon explained that the arrestee

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[1] Jackson v. Denno, 378 U.S. 368 (1964).

is not read the instructions at the top of the rights form, only the portions titled "constitutional rights" and "acknowledgement of rights." Tr. 187, ll. 10-19; see also Tr. 327, ll. 1-12.

When Gander later testified, she further clarified that only the "constitutional rights" section is read aloud to the arrestee. They read the "acknowledgement" paragraph to themselves. She then "ask[s] them if they understood, if they had any questions and if they did understand if they could sign next to their name which [she] had asked them to sign after [she had] written it down." Tr. 360, l. 5 – 362, l. 19. On cross-examination, Gander admitted that she never asked Keith if he could read or write. Tr. 376, l. 24 – 377, l. 23. Notably, the word waiver appears only once on the form signed by Keith, in the first paragraph that was never read to him and which he was never instructed to read to himself. R. * (State's Ex. 1, rights form). Even at trial, the word "waive" or "waiver" was scarcely used. Tr. 169, ll. 8-9; Tr. 188, ll. 19-20; Tr. 362, ll. 16-17.

Discussion

In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966), the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda...." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court wrote: "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the

truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." Accordingly, a defendant has the right to object to the use of the confession and to have an independent hearing and a reliable determination on the issue of voluntariness. Id. at 376-77; State v. Miller, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007) (citing State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976)).

In South Carolina, the judge makes this initial determination of voluntariness required by Denno. 375 S.C. at 382, 652 S.E.2d at 450. In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

The United States Supreme Court has articulated two dimensions to the waiver inquiry: (1) "waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83 (2010)). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Moran v. Burbine, 475 U.S. 412, 421 (1986).

Here, the most glaring problem is the fact that the document presented to Keith provides no indication that his signature constituted a waiver of rights. Rather, the "acknowledgement" paragraph provides only: "I have read or had read to me the statement of my rights shown above.

I understand what my rights are and know what I am doing. I know that the person(s) talking with me is/are a police officer(s) and I understand what he/she is talking about." R. * (State's Ex. 1, rights form). Thus, there is no evidence that Keith voluntarily waived his rights under Miranda.

Further, "[c]ourts have recognized a number of circumstances under which the police can impermissibly undermine the meaning or significance of the Miranda warnings and fail to reasonably convey their meaning, thus negating the validity of a suspect's waiver of his *Miranda* rights." State v. Meyer, 362 P.3d 745, 752 (Wash. 2015). Courts have held confessions inadmissible, for instance, in cases where the police downplay the relevance of the warnings and their application to the current questioning. See Doody v. Schriro, 548 F.3d 847, 862-63 (9th Cir.2008) (Doody I). Giving "different and conflicting sets of warnings" also renders a suspect's Miranda waiver invalid if, as a result of the conflicting instructions, the meaning of the warnings becomes unclear. See United States v. San Juan–Cruz, 314 F.3d 384, 387-88 (9th Cir.2002); United States v. Connell, 869 F.2d 1349, 1352 (9th Cir.1989) ("We reject as fatally flawed ... a version of the Miranda litany if the combination or wording of its warnings is in some way affirmatively misleading....").

The Miranda Court explained:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, **only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.**

384 U.S. at 473 (emphasis added). Here, the statements that an arrestee has the right to an attorney, that there is no way of appointing him one, but that the Court can appoint him one, are exceedingly confusing. This is especially so where, as here, the rights are read at a private residence nowhere near a court.

The trial judge erred in admitting Keith's statements to police where his Miranda warnings were confusing and diluted and where the State did not prove that his rights were validly waived. Keith is accordingly entitled to a new trial.

II.

The trial court erred in admitting testimony from confidential informant Sullivan and former co-defendant, turned State's witness, Brandon regarding alleged other drug activity involving Appellant where such testimony such testimony constituted improper Lyle evidence.

Relevant Facts

In addition to evidence related to the charged offenses alleged to have been committed on April 28, 2016, the trial court allowed the prosecution to admit evidence of the prior alleged undercover purchases made by Brian Sullivan, text messages related to alleged drug sales to other individuals orchestrated by Sherry Brandon on Keith's behalf; and general testimony from both Sullivan regarding alleged prior drug purchases that he made from Keith and Brandon. Tr. 68, l. 6 – 101, l. 3; Tr. 103, l. 13 – 113, l. 15; R. * (State's Ex. 3-4, 9, and 12-17, photographs of text messages); R. * (State's Ex. 2, Home Depot parking lot video, on file with this Court). The only thing that the trial court excluded was evidence of Keith's prior drug conviction, which he determined was too remote and constituted propensity evidence. Tr. 110, ll. 4-13. Other than the other undercover purchases alleged by Sullivan, he could provide no specifics regarding the date, time, price, or type of drug he purportedly purchased from Keith over the course of the year prior to the charged offenses. Tr. 85, l. 20 – 86, l. 16; Tr. 88, l. 5 – 89, l. 4.

Defense counsel argued that the remainder of the proffered evidence had not been established by clear and convincing evidence, that there was no factual connection between the prior conduct and the charged conduct, and that the probative value was outweighed by the danger of unfair prejudice. She further noted that the drugs alleged to have been purchased in the past were not limited to the two drugs that were the subject of the indictments, buprenorphine and hydrocodone. Tr. 16, l. 21 – 18, l. 6; Tr. 104, l. 3 – 108, l. 7. Defense counsel renewed her objections repeatedly as evidence of Keith's alleged other crimes, wrongs, or acts were offered

into evidence. Tr. 199, ll. 17-24; Tr. 210, ll. 1-18; Tr. 212, l. 15 – 217, l. 4; Tr. 257, l. 4 – 259, l. 23; Tr. 268, ll. 1-5; Tr. 276, l. 4 – 287, l. 12; Tr. 400, ll. 17-19.

Discussion

The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation. State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011). At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

In State v. Campbell, 317 S.C. 449, 450, 454 S.E.2d 899, 900 (Ct. App. 1994), police informant Timothy Bellamy testified about drug purchases he made from Campbell prior to the night that resulted in the charged offense of distribution of crack cocaine. This Court reversed

Campbell's conviction, ruling that "[b]y introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because Campbell sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits." 317 S.C. at 451, 454 S.E.2d at 901. This Court further ruled that even if testimony of the prior drugs sales were admissible under the common plan or scheme exception, the prejudicial value of the testimony outweighed the probative value. Id. The Campbell Court noted that "[w]hen the prior bad acts are 'strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.'" Id. (quoting State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Similarly, in State v. Carter, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996), this Court ruled that evidence of a prior drug transaction that occurred on January 14th, four days before the informant made the second buy on January 18th, had "no legal connection . . . sufficient to come within the framework of the common scheme or plan exception." Rather, "the purpose of the State's use of the evidence appears similar to that articulated by this Court in Campbell in that the State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine to Stamps on January 14th, he was selling crack cocaine on January 18th." 323 S.C. at 468, 476 S.E.2d at 918. This Court again ruled that "[t]his is the precise type of inference prohibited by Lyle." Id.; see also State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) (reversing co-defendants' convictions for trafficking cocaine where the State was permitted to introduce voluminous testimony of other bad acts, primarily concerning marijuana use and distribution).

Here, there was much more evidence presented regarding Keith's alleged past conduct than there was about the offenses for which he was being tried. Sullivan's testimony about the

three prior undercover buys related to the sale of Suboxone strips, Dilaudid pills, and Xanax. These are separate drugs from the hydrocodone allegedly purchased on April 28th and the buprenorphine allegedly found on Keith's person during the subsequent execution of the search warrant. Tr. 203, l. 12 – 204, l. 24; Tr. 320, ll. 5-11; Tr. 321, ll. 1-15; Tr. 341, l. 5 – 342, l. 3. The text messages that were unrelated to the April 28th purchase were similarly too removed from the charged conduct to be admissible. R. * (State's Ex. 3-4, 9, and 12-17, photographs of text messages). Sullivan's general testimony that he bought other pills from Keith and Brandon at their house, with no specifics, was not proven by clear and convincing evidence. Tr. 211, l. 18 – 212, l. 9. The text messages admitted through Brandon should not have been excluded because they did not relate to any transaction involving Sullivan or to the same drugs involved in the charged offenses. Tr. 276, l. 1 – 288, l. 13; see Tr. 257, l. 6 – 258, l. 18.

The State argued to the trial court that this evidence was necessary to prove conspiracy, but in its closing argument the prosecution argued that Keith was guilty of trafficking if he possessed the requisite amount, distributed the requisite amount, or conspired to sell the requisite amount. Tr. 111, l. 19 – 112, l. 5; Tr. 258, l. 21 – 259, l. 16; Tr. 408, l. 19 – 409, l. 15; Tr. 411, ll. 8-17. The reality is that the purpose of the evidence was to convince the jury that because Keith purportedly sold drugs to Sullivan in the past, he intended to sell buprenorphine to him on April 28th. Even more spurious, the evidence was admitted to show that because Keith had offered to sell drugs in the past that he would eventually offer to sell the hydrocodone allegedly found in a pill case on his person. Our rules of evidence do not permit the admission of such evidence for this purpose and the trial judge erred in allowing its admission. Keith is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Dinal Keith respectfully requests that this Court reverse his convictions and sentences and remand his case for a new trial.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DINAL WAYNE KEITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Dinal Wayne Keith, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 1st day of February, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .

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